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ALEXANDER L. STEVAS,
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No. 81-2159

In the Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF KAREN G. SILKWOOD, DECEASED, APPELLANT

v.

KERR-MCGEE CORPORATION and KERR-MCGEE NUCLEAR CORPORATION

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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QUESTIONS PRESENTED

1. Whether the authority to award punitive damages under state law against a federally licensed plutonium processing facility for conduct regulated by the Nuclear Regulatory Commission is preempted by the Atomic Energy Act.

2. Whether the preemption of the authority to grant punitive damages under those circumstances violates the Due Process Clause.

TABLE OF CONTENTS

	Page
Jurisdiction	1
Summary of argument	10
Argument:	
The Atomic Energy Act preempts the authority of the states to award punitive damages against operators of nuclear facilities for conduct regulated by federal law	12
A. The Atomic Energy Act and NRC regulations preempt "the entire field of nuclear safety concerns"	13
B. The Price-Anderson Act does not support appellant's argument that the state is authorized to award punitive damages	23
Conclusion	35

TABLE OF AUTHORITIES

Cases:

Amoco Pipeline Co. v. *Montgomery*, 487 F. Supp. 1268	35
Associated General Contractors, Inc. v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983)	7
Atlantic Research Corp., In re, 11 N.R.C. 413	18, 33
Baltimore National Bank v. *State Tax Commission*, 296 U.S. 538	3
Calero-Toledo v. *Pearson Yacht Leasing Co.*, 416 U.S. 663	4
California v. *Grace Brethren Church*, No. 81-31 (June 18, 1982)	5
Charleston Federal Savings & Loan Ass'n v. *Alderson*, 324 U.S. 182	3
Chicago & North Western Transportation Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311	23
Citizens National Bank v. *Durr*, 257 U.S. 99	3

Cases—Continued

	Page
City of Detroit v. *Murray Corp.*, 355 U.S. 489	2, 6
County of Arlington v. *United States*, No. 81-2019 (Oct. 4, 1982)	4
Cox v. *Theus*, 569 P.2d 447	35
Dahnke-Walker Co. v. *Bondurant*, 257 U.S. 282	4
Dayton Hudson Corp. v. *American Mutual Liability Insurance Co.*, 621 P.2d 1155	21
Delaware v. *Prouse*, 440 U.S. 648	9
Duke Power Co. v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59	26, 35
Dutton v. *Evans*, 400 U.S. 74	2, 6
Electrical Workers v. *Foust*, 442 U.S. 42	33
Farmer v. *Carpenters*, 430 U.S. 290	21
Fornaris v. *Ridge Tool Co.*, 400 U.S. 41	4
Garner v. *Teamsters*, 346 U.S. 485	30
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323	10
Hanson v. *Denckla*, 357 U.S. 235	3
Illinois v. *NRC*, 591 F.2d 12	19
Indian Territory Illuminating Oil Co. v. *Board of Equalization*, 287 U.S. 573	3
Irvine v. *Spaeth*, 314 U.S. 575	3
Lake Michigan Federation v. *NRC*, 606 F.2d 1364	19
Local 926, Operating Engineers v. *Jones*, No. 81-1574 (Apr. 4, 1983)	23
Malone v. *White Motor Corp.*, 435 U.S. 497	2, 6
Massachusetts Bonding Insurance Co. v. *United States*, 352 U.S. 128	25
McCarroll v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176	6
McKay v. *United States*, 703 F.2d 464	30, 31
Memphis Natural Gas Co. v. *Beeler*, 315 U.S. 649	3
Metropolitan Edison Co. v. *People Against Nuclear Energy*, Nos. 81-2399 and 82-358 (Apr. 19, 1983)	30
Minnesota v. *Alexander*, 430 U.S. 977	4
Minnesota v. *Hoffman*, 543 F.2d 1198, appeal dismissed and cert. denied, 430 U.S. 977	4
Nixon v. *Oklahoma City*, 555 P.2d 1283	7, 8
Northern States Power Co. v. *Minnesota*, 447 F.2d 1143, aff'd, 405 U.S. 1035	31

Cases—Continued Page

Orr v. *Orr*, 440 U.S. 268 9
Pacific Gas & Electric Co. v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983) 4, 10, 12, 13, 21, 22, 32, 35
Perry Education Ass'n v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983) 4
Power Reactor Co. v. *Electricians*, 367 U.S. 396.... 14
Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 3
Rockford League of Women Voters v. *NRC*, 679 F.2d 1218 19
Rohr Aircraft Corp. v. *San Diego County*, 362 U.S. 628 3
San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 23
Smith v. *Wade*, No. 81-1196 (Apr. 20, 1983) 21
Teamsters Union v. *Morton*, 377 U.S. 252 27
United Automobile Workers v. *Russell*, 356 U.S. 634 21
United Construction Workers v. *Laburnum Corp.*, 347 U.S. 656 21
United States v. *Christian Echoes Ministry*, 404 U.S. 561 5
United States v. *Clark*, 445 U.S. 23 ..... 5, 9
United States v. *Raines*, 362 U.S. 17 9
Wilson v. *Cook*, 327 U.S. 474 ..... 3, 4
Zacchini v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 9

Constitution, statutes and regulations:

U.S. Const.:
Amend. V 35
Supremacy Clause 4, 21, 22
Atomic Energy Act of 1954, 42 U.S.C. (& Supp. V) 2011 *et seq.* 10
42 U.S.C. 2011-2012 34
42 U.S.C. 2014(j) 24
42 U.S.C. 2014(aa) 14
42 U.S.C. 2021(a)(1) 14
42 U.S.C. 2021(a)(2) 14

Constitution, statutes and regulations—Continued

	Page
42 U.S.C. (Supp. V) 2021(b) (Section 274(b))	14
42 U.S.C. (& Supp. V) 2021(c) (Section 274(c))	14, 15
42 U.S.C. (& Supp. V) 2021(c)(1) (Section 274(c)(1))	10, 15
42 U.S.C. 2073(e)(7)	14
42 U.S.C. (& Supp. V) 2077	14
42 U.S.C. 2133(b)	14
42 U.S.C. 2201(b)	10, 14
42 U.S.C. 2201(i)(3)	10, 14
42 U.S.C. 2239	19
42 U.S.C. (& Supp. V) 2271-2284	18
42 U.S.C. (& Supp. V) 2272-2278b	18, 33
42 U.S.C. 2280	18
42 U.S.C. (& Supp. V) 2282	18, 21
42 U.S.C. (Supp. V) 2282(a)	11, 22, 33
42 U.S.C. (Supp. V) 2283-2284	18, 33
Energy Reorganization Act of 1974, 42 U.S.C. (& Supp. V) 5801 *et seq.*	13
42 U.S.C. (Supp. V) 5841(f)	14
Price-Anderson Act, 42 U.S.C. 2210:	
42 U.S.C. 2210	11, 22, 23
42 U.S.C. 2210(a)	24
42 U.S.C. 2210(b)	24
42 U.S.C. 2210(c)	24
42 U.S.C. 2210(e)	24, 31
42 U.S.C. 2210(i)	27
42 U.S.C. 2210(n)	30
26 U.S.C. 3309	5
26 U.S.C. 3309(b)	5
28 U.S.C. 1252	5, 9
28 U.S.C. 1254(1)	9
28 U.S.C. 1254(2)	2, 3, 4, 6, 8, 9, 10
28 U.S.C. 1257	4
28 U.S.C. 1257(2)	3
28 U.S.C. 1257(3)	9

Constitution, statutes and regulations—Continued	Page
28 U.S.C. 2403(b)	6, 7
Pub. L. No. 85-256, 71 Stat. 576	23
Pub. L. No. 89-210, 79 Stat. 855	23
Pub. L. No. 89-645, 80 Stat. 891	24
Pub. L. No. 94-197, 89 Stat. 1111	24
Okla. Stat. Ann.:	
tit. 23 (West 1955):	
§ 3	7
§ 9	2, 5, 6, 7, 8
tit. 85 (West 1970 & Supp. 1982-1983):	
§§ 11-12	8
10 C.F.R. Part 2:	
Section 2.206	18
Section 2.206(a)	11
Section 2.206(c)(1)	18
10 C.F.R. 19.12	16
10 C.F.R. Part 20	30
Section 20.1(c)	16
Section 20.101-20.108 & app. B	16, 31
Section 20.202	16
Section 20.203	16
Section 20.401(c)	19
Section 20.402	16
10 C.F.R. Part 70	17
Section 70.21(a)	14
Section 70.61-70.62	18
10 C.F.R. Part 73	17
Section 73.40-73.60	17
10 C.F.R. Part 140:	
Section 140.91	24
app. A, ¶ 1(b)(1)	24
app. A, ¶ 2(c)	25
Section 140.92	25
app. B, art. II ¶ 4(a)	24
app. B, art. II ¶ 5(d)	25

Miscellaneous:

17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* (1978) 2
Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv. L. Rev. 644 (1964) 29, 33
105 Cong. Rec. 8384 (1959) 15
33 Fed. Reg. 6982 (1968) 25
47 Fed. Reg. (1982):
p. 9990 34
pp. 9990-9995 34
p. 9991 ..... 11, 21, 33
Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Comm. on Atomic Energy, 86th Cong., 1st Sess. (1959) 15
Governmental Indemnity: Hearings Before the Joint Comm. on Atomic Energy, 84th Cong., 2d Sess. (1956) 28
Hart & Wechsler's Federal Courts and the Federal System 637-640 (2d ed. 1973) 3
H.R. Rep. No. 883, 89th Cong., 1st Sess. (1965) 27, 28
H.R. Rep. No. 1125, 86th Cong., 1st Sess. (1959) 10, 15, 20
Problems in the Accounting for and Safeguarding of Special Nuclear Materials: Hearings Before the Subcomm. on Energy and Environment of the House Comm. on Small Business, 94th Cong., 2d Sess. (1976) 16, 18
***Proposed Amendments To Price-Anderson Act Relating To Waiver Of Defenses: Hearings Before the Joint Comm. on Atomic Energy*, 89th Cong., 2d Sess. (1966)** **27, 28**
***Proposed Extension of AEC Indemnity Legislation: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy*, 89th Cong., 1st Sess. (1965)** **28, 29, 30**
***Restatement (Second) of Torts* (1979)** **21**
S. Rep. No. 296, 85th Cong., 1st Sess. (1957) 26, 27, 29
S. Rep. No. 870, 86th Cong., 1st Sess. (1959) **15**
S. Rep. No. 650, 89th Cong., 1st Sess. (1965) **27, 28**

Miscellaneous—Continued Page

S. Rep. No. 1605, 89th Cong., 2d Sess. (1966) ...27, 29, 30
S. Rep. No. 94-454, 94th Cong., 1st Sess. (1975) 27
E. Stason, S. Estep, & W. Pierce, *Atoms and the Law* (1959) 30
Symposium on the Oklahoma Law of Damages, 6 Okla. L. Rev. 289 (1953) 7

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v.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1981 (J.S. App. 1a). The petition for rehearing was denied on February 19, 1982 (J.S. App. 41a). A notice of appeal (J.S. App. 127a) was filed on May 10, 1982. The jurisdictional statement was filed with the Court on May 20, 1982. On January 10, 1983 the Court postponed consideration of the question of jurisdiction to the hearing of the case on the merits.

1. Appellant asserts that this case is within the Court's appellate jurisdiction under 28 U.S.C. 1254(2) because the court of appeals held Oklahoma's punitive damages statute (Okla. Stat. Ann. tit. 23, § 9 (West 1955)) invalid as applied to the circumstances of this lawsuit. In fact, the parties did not explicitly address the validity of the Oklahoma statute in the court of appeals, and the court of appeals did not mention the statute in its opinion. The court's decision seems to rest simply on the conclusion that federal law creates an immunity from state imposition of punitive damages, without passing on the question of the statute's validity. Section 1254(2) does not authorize an appeal under these conditions.

28 U.S.C. 1254(2) states that this Court may review cases in the courts of appeals "[b]y appeal by a party relying on a *State statute* held by a court of appeals *to be invalid* as repugnant to the Constitution * * * or laws of the United States" (emphasis added). Section 1254(2) may be invoked where the court of appeals has held that a state law is invalid, not in all conceivable circumstances, but only as applied to the facts of the case.[1] On the other hand, jurisdiction by appeal does not lie where the court has merely construed a state statute as inapplicable, in order to avoid questions about its validity.[2] Nor does appeal lie where the only issue addressed is the existence of a federal immunity, and the invalidity of a state statute is neither asserted by the litigants nor made a basis for the court of appeals' holding.

The distinction between attacking a state statute as applied, and resisting a particular exercise of state authority on the ground of a federal immunity (without contesting the validity of the statute), makes the choice between appeal and certiorari jurisdiction turn in part on

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[1] See *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 (1978); *Dutton* v. *Evans*, 400 U.S. 74, 76 n.6 (1970); *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 491-492 (1958).

[2] 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4037, at 47-48 (1978).

the language chosen by the parties and the lower court. This Court has nonetheless consistently maintained the distinction, despite pressure to treat the two types of cases alike. A long line of decisions construing 28 U.S.C. 1257(2) and its predecessors has explained the reason:

> It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled.

Memphis Natural Gas Co. v. *Beeler*, 315 U.S. 649, 650-651 (1942).[3] The insistence that the parties (or the

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[3] See also *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (" 'It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws.' * * * [W]e view [appellants'] arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court. * * * Such claims are properly brought before this Court by way of our certiorari, rather than appellate, jurisdiction"); *Rohr Aircraft Corp.* v. *San Diego County*, 362 U.S. 628, 629-630 (1960); *Hanson* v. *Denckla*, 357 U.S. 235, 244 & n.4 (1958); *Wilson* v. *Cook*, 327 U.S. 474, 480-482 (1946); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185-187 (1945); *Irvine* v. *Spaeth*, 314 U.S. 575 (1941); *Baltimore National Bank* v. *State Tax Commission*, 296 U.S. 538 (1935); *Indian Territory Illuminating Oil Co.* v. *Board of Equalization*, 287 U.S. 573 (1932); *Citizens National Bank* v. *Durr*, 257 U.S. 99, 106 (1921). See generally *Hart & Wechsler's Federal Courts and the Federal System* 637-640 (2d ed. 1973).

In these cases the state court sustained the state's action against a federal challenge, and the question was generally whether the *appellant* had framed his challenge as an attack on the statute (as applied) rather than as a claim of federal immunity. In appeals under 28 U.S.C. 1254(2) the federal court has sustained a federal challenge to state action, and the question is generally whether the *court* invalidated a state statute (as applied) or merely upheld a federal immunity.

court) expressly address the statute's validity provides a rein on a jurisdictional rule that could otherwise engulf this Court's obligatory jurisdiction. See *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 298-303 (1921) (Brandeis, J., dissenting). But equally important, it provides assurance that the state (or federal[4]) court most familiar with a state's law has had a focused opportunity to consider questions of construction before speaking to the graver issue of the validity of a state statute under the Supremacy Clause. See *Wilson* v. *Cook*, 327 U.S. 474, 480 (1946).

Section 1254(2), which closely parallels Section 1257 (see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-677 n.11 (1974)), has been read in the same narrow way.[5] In *Minnesota* v. *Hoffman*, 543 F.2d 1198 (8th Cir. 1976), for example, the court of appeals held that the Supremacy Clause precluded Minnesota from applying state water pollution control laws to the Army Corps of Engineers. The court of appeals did not say that the Minnesota law was pro tanto invalid; it said rather that the Corps' operations were constitutionally immune from state control. This Court dismissed the State's appeal for want of jurisdiction. *Minnesota* v. *Alexander*, 430 U.S. 977 (1977). Even those dissenting from the dismissal acknowledged that mandatory appellate jurisdiction could be "defeated by the Court of Appeals' failure to make express its invalidation of the statute as applied to the Corps" (*id.* at 978 n.1 (Stevens, J., dissenting)).[6]

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[4] See *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 21.

[5] See *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970) (28 U.S.C. 1254(2) is to be narrowly construed).

[6] See also *County of Arlington* v. *United States*, dismissed for want of jurisdiction, No. 81-2019, (Oct. 4, 1982); *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 4.

The general principle in such cases is that appeals may not be taken where the invalidity of the state statute is neither an explicit basis for the litigant's federal claim nor a necessary predicate for the court of appeals' decision.[7] In this case the opinion of the court of appeals does not even mention Okla. Stat. Ann. tit. 23, § 9 (West 1955)—the statute that appellant contends was held unconstitutional. Neither did the briefs filed by the parties in the court of appeals contest or defend the constitutionality of Section 9. Appellees, who disputed the punitive damages awarded by the district court, argued instead that compliance with federal regulations negated the state of mind required for punitive damages, and that such damages—because they amounted to regulation—would impermissibly control conduct that was to be governed exclusively by the Nuclear Regulatory Commission (79-1894 Defendants-Appellants Br. 61-64). At most, both contentions assert simply a federal immunity, not the invalidity of Oklahoma's statute. Both are consistent with a conclusion that, for the reasons advanced by appellees, the Oklahoma punitive damages statute should be read not to cover this case. Appellant in the portion of his brief responding to those arguments did not mention the Oklahoma statute (79-1894 Plaintiff-Appellee Br. 49-54). Neither did the court of appeals. Moreover, we are informed by counsel for the parties that no certification was made to the Oklahoma attorney general that the constitutionality of

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[7] Cf. *United States* v. *Christian Echoes Ministry*, 404 U.S. 561, 563-564 (1972) (28 U.S.C. 1252). In *California* v. *Grace Brethren Church*, No. 81-31 (June 18, 1982), relied on by appellant (Br. 4), this Court held that an appeal under 28 U.S.C. 1252 was proper even though the district court had not expressly held 26 U.S.C. 3309(b) unconstitutional as applied to certain religious schools. In contrast to this case, however, the determination of unconstitutionality "'was a necessary predicate to the relief'" granted by the district court. Slip op. 11, quoting *United States* v. *Clark*, 445 U.S. 23, 26 n.2 (1980). The district court *had* expressly held unconstitutional the federal-state "unemployment compensation scheme," which included Section 3306. Slip op. 12.

the Oklahoma puntive damages statute had been drawn in question. See 28 U.S.C. 2403(b).[8]

2. It would appear, then, that this case does not satisfy the requirements for appellate jurisdiction under 28 U.S.C. 1254(2), since the court of appeals was not asked to decide, nor did it address, the constitutionality of Okla. Stat. Ann. tit. 23, § 9 (West 1955) as applied. The wisdom of the general rule against accepting jurisdiction under such circumstances is illustrated by several special aspects of this case. First, this is not one of those cases where the challenge to state law was raised after the state itself—by executive,[9] administrative,[10] or even judicial[11] action—asserted that its statute does indeed cover the facts before the federal court. Punitive damages were awarded here simply by virtue of the jury instruction given by the federal district judge, whose conclusions—however persuasive—give no authoritative indication of

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[8] The court of appeals did, as appellant notes (Br. 2-3), speak unambiguously of "preemption" of punitive damages by the Atomic Energy Act. See J.S. App. 21a-24a. But neither the majority (*ibid.*) nor the dissent (*id.* at 32a-40a) cited any Oklahoma case or statute which might define the circumstances under which Oklahoma allows awards of punitive damages. Instead, the issue addressed by both seemed to be whether the general common-law power to make such awards is preempted by the Act. See, *e.g.*, *id.* at 24a ("[a] judicial award of exemplary damages under state law * * * is no less intrusive than direct legislative acts of the state"); *id.* at 34a ("the issue [is] whether a civil action * * * is subject to preemption").

[9] See, *e.g.*, *City of Detroit* v. *Murray Corp.*, *supra* note 1 (city and county assessed taxes against appellee); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 178 (1940) (revenue officer assessed taxes against appellee).

[10] *Malone* v. *White Motor Corp.*, *supra* note 1 (state Commissioner of Labor and Industry imposed a pension funding charge on appellee).

[11] *Dutton* v. *Evans*, *supra* note 1 (state supreme court held coconspirator declaration admissible under state statute).

what is the state's policy.[12] Not even the court of appeals addressed the proper construction of Oklahoma's law. In these circumstances it seems unnecessary to invoke this Court's mandatory jurisdiction, which is designed to protect the state's interest in the integrity of its *statutory* law.

Second, Oklahoma's punitive damages provision is nothing more than a "legislative recognition [of] a common law rule of long standing and acceptance." *Symposium on the Oklahoma Law of Damages*, 6 Okla. L. Rev. 289, 293 (1953). It is part of a codification that restates rules of damages in the most general terms.[13] The state's courts exercise considerable freedom in interpreting such rules, much as they would the common law which the rules embody.[14] There is, therefore, little reason to reach out and sweep within this Court's mandatory jurisdiction a case only tangentially implicating Congress's purpose to assure Supreme Court review where a federal court invalidates a policy decision made by the state legislature as such.

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[12] Indeed, we have no indication whatever how the state might read its punitive damages law, since the court of appeals made no certification to the Oklahoma attorney general under 28 U.S.C. 2403(b).

[13] See, *e.g.*, Okla. Ann. Stat. tit. 23, § 3 (West 1955) ("[a]ny person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages"). Cf. *Associated General Contractors, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip op. 13.

[14] In *Nixon* v. *Oklahoma City*, 555 P.2d 1283 (1976), the Oklahoma Supreme Court held that punitive damages could not be recovered against a municipality because the public had "little direct control" over its agents, and the deterrent effect of such damages was consequently minimal. *Id.* at 1285. "If no social benefit is to be derived from the imposition of exemplary damages, all legal justification for the award collapses" (*ibid.*). The court did not mention Okla. Stat. Ann. tit. 23, § 9 (West 1955) in its opinion.

It is difficult to say whether Oklahoma's courts would find that punitive damages could be awarded in the circumstances of this case. They might conclude, for example, that the "legal justification for the award" (see *Nixon* v. *Oklahoma City*, note 14, *supra*) was superfluous in light of the criminal and civil penalties which federal law may impose on licensees of plutonium processing and fuel fabrication facilities.[15] Alternatively, they might decide that compliance with federal regulations negates as a matter of state law the state of mind required by Section 9. It is also possible that they would conclude, as appellees have contended (Mot. to Dis. or Aff. 18-19), that punitive damages may not be recovered where the plaintiff's action for compensatory damages has been replaced by the workers' compensation law. See Okla. Stat. Ann. tit. 85, §§ 11-12 (West 1970 & Supp. 1982-1983).[16] None of those questions was addressed by the court of appeals, though it might very well have done so—had the issue of validity been explicitly raised—before holding that the state's legislature had unconstitutionally invaded the province of federal law.

3. Appellant argues (Br. 4-5) that the court of appeals' failure to address possible state law limitations on punitive damages is irrelevant, since this Court's jurisdiction is determined by the issues that the court of appeals actually did decide. As an abstract matter, that proposi-

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[15] See pages 18-19, *infra*.

[16] This uncertainty about the bounds of common law principles explains in part the limitation put on appeals by 28 U.S.C. 1254(2): it provides mandatory review when a state statute is held invalid, but not when state common law is displaced. It is not clear whether a state may finesse the distinction by making a statutory declaration of common law, as Oklahoma has in its damages statute. Cf. J.S. 17-22 ("The Decision Below Violated the Standards Respecting Preemption of Common-Law Rights Recognized by This Court."). But the Court need not address that question in this case, since the court of appeals did not consider the coverage of Okla. Stat. Ann. tit. 23, § 9 (West 1955).

tion is unexceptionable; but it does not aid appellant in this case. In each of the cases cited by appellant for this proposition (Br. 5 & n.9) it was beyond doubt that the lower court *did* decide the question of federal law on which this Court's jurisdiction turned.[17] In this case, by contrast, the court of appeals did not even cite the very statute appellant contends was held unconstitutional. Given the court's silence, it is difficult to say whether it assumed that the statute was unconstitutional as applied (28 U.S.C. 1254(2)), or whether it simply concluded that the district court had improperly ignored a federal immunity in allowing the jury to award punitive damages (28 U.S.C. 1254(1)). In attempting to define the basis for the court of appeals' decision, it is not only permissible but wise to consider the fact that the court

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[17] The very passage appellant quotes from *Orr* v. *Orr*, 440 U.S. 268 (1979), is prefaced by the statement that

> if there were ambiguity as to whether the State's decision was based on federal or state grounds, it would be open to this Court not to determine the federal question, but to remand to the state courts for clarification as to the ground of the decision.
>
> * * * * *
>
> *But there is no ambiguity here.*

Id. at 276 (citation omitted; emphasis added). See also *United States* v. *Raines*, 362 U.S. 17, 20 (1960) (28 U.S.C. 1252) ("the [district] court ruled that * * * the statute on its face was * * * unconstitutional in all its applications"); *United States* v. *Clark*, *supra*, 445 U.S. at 26 n.2 (28 U.S.C. 1252) ("a determination that * * * 5 U.S.C. 8341(a)(3)(A) was unconstitutional was a necessary predicate to the relief the Court of Claims granted"); *Delaware* v. *Prouse*, 440 U.S. 648, 652 (1979) (28 U.S.C. 1257(3)) ("[a]t least, it is suggested, the matter is sufficiently uncertain that we should remand for clarification * * *. Based on our reading of the opinion, however, we are satisfied that * * * the Delaware Supreme Court did not intend to rest its decision independently on the State Constitution"); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977) (28 U.S.C. 1257(3)) ("[t]here is no doubt that petitioner's complaint was grounded in state law * * *. It is also clear that respondent's claim of constitutional privilege was sustained").

failed to ask the questions that usually precede a holding that a statute is unconstitutional.

Because this is not a case where a "state statute was held by a court of appeals to be invalid as repugnant to the Constitution" (28 U.S.C. 1254(2)), the appeal should be dismissed for want of jurisdiction.[18]

SUMMARY OF ARGUMENT

In *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Commission*, No. 81-1945 (Apr. 20, 1983), slip op. 19, this Court made clear that "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." The authority to impose punitive damages—"private fines levied by civil juries" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)) to punish and deter conduct the state deems unsafe—is not among those "expressly ceded" limited powers.

A. The Atomic Energy Act of 1954, 42 U.S.C. (& Supp. V) 2011 *et seq.*, gives the Nuclear Regulatory Commission ("NRC") the exclusive power to regulate the operation of facilities like Kerr-McGee's plant "in order to protect health or to minimize danger to life or property * * *." 42 U.S.C. 2201(b) and (i)(3). The exclusivity of that power was reaffirmed in the 1959 amendments to the Act. 42 U.S.C. (& Supp. V) 2021 (c)(1). Among the reasons Congress gave for withholding such authority from the states was that "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." H.R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959). The NRC has implemented its authority with detailed regulations.

The Atomic Energy Act also provides a detailed system of civil and criminal penalties for violations of the Act,

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[18] For the reasons stated in our earlier brief (U.S. Br. 10-11), we believe this case does not present an issue worthy of review on writ of certiorari.

NRC regulations, and license conditions. Civil penalties may be imposed in amounts up to $100,000 per violation. 42 U.S.C. (Supp. V) 2282(a). The regulations permit states concerned about the safe operation of nuclear facilities to request the imposition of such penalties. 10 C.F.R. 2.206(a).

In this case the NRC conducted a thorough investigation of Silkwood's contamination, and concluded that the imposition of punitive sanctions was not warranted. Notwithstanding this conclusion, appellant seeks to uphold a $10 million punishment imposed on Kerr-McGee under state law. The authority to impose such a punitive damages award under state law for the same incident should be deemed preempted, for it plainly rests on substantive standards in conflict with those the NRC has set to govern licensee conduct. The jury in this case was charged that it, rather than the NRC, was to decide what constituted "reasonable care in handling plutonium" (J.S. App. 102a). Further, allowing the imposition of state-law punitive damages conflicts with the federal remedial scheme. The punitive award in this case was one hundred times the $100,000 penalty federal law permits per violation. 42 U.S.C. (Supp. V) 2282(a). Such a fine can upset the balance set by Congress between deterring unlawful conduct and encouraging the activities promoted by the Atomic Energy Act. It could also "adversely affect[] a licensee's ability to safely conduct licensed activities." 47 Fed. Reg. 9991 (1982).

B. The Price-Anderson Act, 42 U.S.C. 2210, does not support appellants' argument that punitive damages may be awarded. The Act does not apply to this case; in any event, as the legislative history demonstrates, Congress left to state law only the power to award compensatory damages.

Appellant argues that state authority to award compensatory damages necessarily entails the additional authority to award punitive damages. But that argument ignores this Court's conclusion that "the federal govern-

ment has occupied the entire field of nuclear safety concerns, except the limited powers *expressly* ceded to the states." *Pacific Gas & Electric Co., supra*, slip op. 19 (emphasis added). A primary purpose of punitive damages is to regulate an entire range of future conduct that cannot be controlled by an award of compensation. Congress wished the states to ensure that licensees compensate the public for the costs of accidents. Congress also required the nuclear industry to take additional measures to protect the public health and safety, but it left the definition and the enforcement of those additional measures to the NRC.

ARGUMENT

THE ATOMIC ENERGY ACT PREEMPTS THE AUTHORITY OF THE STATES TO AWARD PUNITIVE DAMAGES AGAINST OPERATORS OF NUCLEAR FACILITIES FOR CONDUCT REGULATED BY FEDERAL LAW

In *Pacific Gas & Electric Co., supra*, this Court rejected California's claim that a state could forbid construction of nuclear power plants until its safety concerns were satisfied by the federal government (slip op. 19-20; footnote omitted):

> State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government." *Rice* v. *Santa Fe Elevator Corp.*, [331 U.S. 218, 236 (1947)].

The award of punitive damages for violation of state standards (set by a jury) regarding the safe operation of a plutonium production facility is unquestionably a regulation within the "field of nuclear safety concerns." That

field is reserved to the federal government and forbidden to the states by the Atomic Energy Act, and the NRC has promulgated detailed regulations to implement its authority with respect to the regulation of those "safety concerns." The court of appeals correctly concluded that the state's authority to take punitive action was thus preempted.

A. The Atomic Energy Act And NRC Regulations Preempt "The Entire Field Of Nuclear Safety Concerns"

Appellant's brief, by reviewing at length the legislative history of the Price-Anderson Act and its amendments (Br. 24-27, 29-41), attempts to divert attention from the statute that governs this case. As appellant acknowledges (Br. 26), and as we make clear below (page 24), the Price-Anderson Act does not even apply here. The issue of preemption is instead governed by the Atomic Energy Act of 1954, and by the 1959 amendments that ceded to the states certain narrowly defined powers to regulate nuclear safety. Both the original Act and the 1959 amendments were designed to put the activities at issue here within the exclusive control of the NRC.

1. Until the enactment of the Atomic Energy Act of 1954, the federal government had maintained an absolute monopoly over atomic energy, leaving no role whatever for the states. *Pacific Gas & Electric Co.*, *supra*, slip op. 13-14. In order to encourage the private development of atomic energy, Congress relaxed the federal grip to a limited extent in the 1954 Act. Private persons were permitted to build and operate commercial reactors, and the states were authorized to decide "the economic question whether a particular plant should be built" (*id.* at 14). But Congress left with the NRC[19] the exclusive

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[19] The Atomic Energy Commission, established by the 1954 Act, was abolished by the Energy Reorganization Act of 1974, 42 U.S.C. (& Supp. V) 5801 *et seq.* Its licensing and regulatory functions

power "to govern the possession and use of special nuclear material," [20] and to "govern[] the design, location, and operation of facilities" (such as Kerr-McGee's plant) that use such material, "in order to protect health and to minimize danger to life or property * * * ." 42 U.S.C. 2201(b) and (i)(3). Licenses for use and transfer of plutonium and for the operation of production facilities [21] require compliance with NRC "safety standards * * * to protect health and to minimize danger to life or property * * *." 42 U.S.C. (& Supp. V) 2073(e)(7), 2077, 2133(b). As this Court noted in its first decision involving the licensing provisions of the Act, "the responsibility for safeguarding [the] health and safety [of the public] belongs under the statute to the Commission." *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 404 (1961).

In 1959 Congress amended the Atomic Energy Act to grant the states some role in protecting the public health and safety from radiation hazards presented by nuclear materials. 42 U.S.C. 2021(a)(1), (2). The principal substantive provision of the amendment, Section 274(b), 42 U.S.C. (Supp. V) 2021(b), authorizes the NRC, by agreements with state governors, to discontinue its regulatory authority over byproduct and source material (not involved here), and over special nuclear material "in quantities not sufficient to form a critical mass." The chief limitation on the subject matter of such agreements is contained in Section 274(c), which states (42 U.S.C. (& Supp. V) 2021(c)):

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were transferred to the Nuclear Regulatory Commission. 42 U.S.C. (Supp. V) 5841(f). Despite the anachronisms that occasionally result, we will for the sake of simplicity refer to both agencies as "NRC" or "the Commission."

[20] "Special nuclear material" includes plutonium. 42 U.S.C. 2014(aa).

[21] Kerr-McGee was issued a special nuclear material license for the purpose of plutonium processing and fuel fabrication. See 10 C.F.R. 70.21(a).

> [T]he Commission shall retain authority and responsibility with respect to regulation of—
>
> (1) the * * * operation of any production * * * facility * * *.

In the debate leading up to the 1959 amendments, the NRC gave examples of the activities reserved to the Commission by Section 274(c)(1) (105 Cong. Rec. 8384 (1959)):

> [S]uch activities as the processing of special nuclear material, fabrication of fuel elements and similar activities involving significant quantities of special nuclear material will remain subject to the licensing requirements and other regulatory controls of the Commission.
>
> * * * * *
>
> Such activities include, but are not limited to, the possession and storage at the site of the licensed activity of nuclear fuel and of source, special nuclear material and byproduct materials used or produced in the operation of the facility; the transportation of nuclear fuels to and from the reactor site; and the discharge of effluent from the facility.

See also *Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Comm. on Atomic Energy*, 86th Cong., 1st Sess. 306 (1959); S. Rep. No. 870, 86th Cong., 1st Sess. 4, 10 (1959). The House and Senate Reports on the 1959 amendments make clear that this authority reserved to the NRC was exclusive. *Id.* at 8, 9; H.R. Rep. No. 1125, *supra*, at 8, 9. The reasons were several. To some extent the activities in Section 274(c) were thought to be ones "as to which interstate, national, or international considerations may be paramount * * *." But Congress also decided that "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future." H.R. Rep. No. 1125, *supra*, at 3.

NRC regulations cover in great detail the operation of plants like Kerr-McGee's—including those operations bearing on the very sorts of risks that led to this case. The regulations require that workers be instructed about health hazards associated with radiation, and about procedures to minimize exposure (10 C.F.R. 19.12). They also set radiation dose standards for individuals both in and outside restricted areas (Sections 20.101-20.108 & App. B). Licensees must not only comply with specific exposure limits, but "should * * * make every reasonable effort to maintain radiation exposures, and releases of radioactive materials in effluents to unrestricted areas, as low as is reasonably achievable" (Section 20.1(c)). The regulations require licensees to assure that individuals entering restricted areas use personnel monitoring equipment (Section 20.202), to post warnings and in appropriate situations use control devices around radiation areas (Section 20.203), to report the theft or loss of licensed material (Section 20.402),[22] and to notify the NRC immediately of incidents of exposure to radiation (Section

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[22] Appellant argues that "Kerr-McGee's inventory system was so lax that three years after the plant was closed, over forty pounds (18,160 grams) of plutonium still could not be located" (Br. 14). This suggestion is misleading. In making inventory calculations, it is necessary to include in closing inventory the amount of plutonium "held up" in the plant itself. A study of the Cimarron plant by the Energy Research and Development Administration ("ERDA") in 1978 found that "plutonium * * * remained in the equipment, after very thorough cleanout, * * * dispersed in thin layers and small deposits on the inside surfaces of glove boxes * * *, in tanks, pipes, ducts and filters," and so on (Exh. 83, at 7).

When the estimate for "hold up" plutonium is included in the closing inventory, the evidence at trial showed an inventory difference (opening less closing) of 4.4 kilograms (9.68 lbs.) for the 1972-1976 period covered by this plutonium contract. That is .522% of the total receipts of 842 kilograms. The NRC permits an inventory difference of .500% (Tr. 7905-7919). See also *Problems in the Accounting for and Safeguarding of Special Nuclear Materials: Hearings Before the Subcomm. on Energy and Environment of the House Comm. on Small Business*, 94th Cong., 2d Sess. 565 (1976)

20.403). See also 10 C.F.R. Parts 70, 73.[23] Further detailed, tailor-made restrictions are included in individual licenses, which incorporate hundreds of pages of procedures and safeguards for individual facilities. See Def. Exhs. 1-5, 7.

The NRC also carries out an extensive inspection program to monitor compliance with the statute, regulations, and license requirements. During the period at issue here the Commission conducted a minimum of three or four inspections annually into "various areas that relate[d] to public health and safety, worker health and safety, protection of materials and facilities, and the environment" (Tr. 8145, 8148). In addition to periodic inspections, the NRC has "a policy that it will investigate any and all allegations [concerning] health and safety issues or potential health and safety issues" (*id.* at 8146). The Director of NRC's Region III Office, charged with oversight of Kerr-McGee's plant, testified at trial that "it was our view that the Kerr-McGee plant was being safely operated. If that were not the view of my office, I would have shut the facility down" (*id.* at 8157). See also

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("*Special Nuclear Materials Hearings*") ("the cumulative difference [was] * * * less than 0.5% of throughput").

With regard to the "hold up" plutonium the ERDA report concluded that "[a]lthough there is a significant quantity of plutonium within the physical confines of the building, the plutonium is spread out over about 30,000 square feet of glove box surfaces, tanks, equipment, and in nearly a mile of piping. It is the ERDA Team's opinion that the distribution of plutonium within the plant as it is now in standby is not a divertable source of plutonium" (P. Exh. 83, at 3).

[23] Appellant makes much of the fact that the Cimarron plant's detection system was not sensitive to amounts less than half a gram (Br. 14). But the security system—designed to prevent sabotage and theft of weapons materials—was not intended to be a safeguard against removal of smaller amounts of plutonium. Cf. 10 C.F.R. 73.40-73.60. The work practices and monitoring systems inside the plant which workers were required to employ were designed for that purpose.

Special Nuclear Materials Hearings, supra, note 22, at 548-1407.

Violations of the Atomic Energy Act and the regulations enforcing it are subject to strict criminal and civil penalties. 42 U.S.C. (& Supp. V) 2271-2284. Criminal conviction for willful violations of various provisions of the Act may result in substantial fines and imprisonment. 42 U.S.C. (& Supp. V) 2272-2278b, 2283-2284. The Attorney General may seek injunctive relief to prevent or stop violations of the Act or NRC regulations or orders. 42 U.S.C. 2280. The NRC itself can impose civil penalties for violations of specific licensing provisions of the Act. 42 U.S.C. (& Supp. V) 2282.[24] In 1980 Congress increased the maximum civil penalty to $100,000 per violation; if the violation is a continuing one, each day constitutes a separate violation. 42 U.S.C. (Supp. V) 2282(a). Finally, the NRC can initiate proceedings to modify, suspend, or revoke any license issued under the Act, and in an emergency, can make such action effective immediately. 10 C.F.R. 70.61-70.62.

NRC regulations also provide a procedure by which states concerned with the safe operation of nuclear facilities can request federal enforcement, including civil fines and license suspension. 10 C.F.R. 2.206 states that

> (a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper.

The Directors' decisions are reviewable by the Commission itself (Section 2.206(c)(1)), and its decisions in turn

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[24] Since the time of Silkwood's contamination, the NRC has decided that civil fines may be imposed even in cases where there is no showing of licensee misfeasance, in the interest of specific and general deterrence. *In re Atlantic Research Corp.*, 11 N.R.C. 413 (1980).

are subject to judicial review (42 U.S.C. 2239). This procedure has been frequently invoked for the same purpose for which punitive damages were awarded here. *Lake Michigan Federation* v. *NRC*, 606 F.2d 1364 (D.C. Cir. 1979); *Illinois* v. *NRC*, 591 F.2d 12 (7th Cir. 1979); *Rockford League of Women Voters* v. *NRC*, 679 F.2d 1218 (7th Cir. 1982).

This detailed federal regulatory regime was in fact in operation in this very case. The NRC Regulatory Operations branch was notified of Silkwood's contamination, and investigated the incidents from November 8 to December 4, 1974 (Mot. to Dis. Or Aff. App. A1). In the course of its investigation of the incident the NRC interviewed 40 of Kerr-McGee's employees and others outside the plant. It reviewed the results of some 40,000 air samples taken throughout the plant, the plant's physical protection program (which had been inspected two months earlier), Silkwood's apartment and other areas where contamination might have occurred, and all medical data relevant to the incidents (*id.* at A7-A62). Regulatory Operations concluded that the contamination had resulted from something less than .0003 grams of plutonium, and "probably did not result from an accident or incident within the plant" (*id.* at A2, A6). Apart from Kerr-McGee's failure to record the voiding dates for two bioassay samples provided by Silkwood (*ibid.*; see 10 C.F.R. 20.401(c)), the investigation did not reveal any relevant violations of federal license conditions or regulations. On the basis of its investigation, the Commission concluded that the imposition of sanctions against Kerr-McGee was not warranted.

2. If, in this case, instead of awarding punitive damages, the State of Oklahoma had enacted its own regulations governing radiation exposure, plant security, and monitoring of those with access to restricted areas; if it had conducted its own investigation into the operation of appellees' plant after learning that Silkwood had been contaminated with plutonium, and concluded that appellees had violated those state regulations; and if on

that basis it had fined appellees $10 million, it would surely be clear that its action would be invalid—pre-empted by the Atomic Energy Act. The fact that Oklahoma's substantive rules governing plant operations competed with federal statutory and regulatory rules, and the fact that its penalties conflicted with the federal civil and criminal enforcement scheme, would be manifest.

In substance, what the state did here constituted—in a different form—precisely the same sort of forbidden intrusion into the federal substantive and remedial schemes. In this case the district court instructed the jury that under state law it should make its own determination of "what constitutes the exercise of reasonable care in handling plutonium, or the existence of reckless and wanton conduct, in light of the physical characteristics of that material and the risks associated with it" (J.S. App. 102a). If the jury concluded that appellees' conduct did not satisfy its standards, it was permitted to award punitive damages "as a punishment to [appellees] for the general benefit of society" and to deter similar offenses in the future (*id.* at 112a).

Like the enactment of state regulations, allowing a jury to define "what constitutes the exercise of reasonable care in handling plutonium" invades the field of nuclear safety concerns by setting up substantive standards in competition with those fixed by federal law. As we noted earlier, Congress made the Commission's authority exclusive because "the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them" (H.R. Rep. No. 1125, *supra*, at 3). It is less likely still that a lay jury could make an informed judgment on such issues. The NRC has set specific standards to govern radiation doses, instruction of workers, monitoring and control devices, accident reporting, plant security, and so on (see pages 16-17, *supra*). The jury charge in this case, by contrast, invited the jury to decide that "reasonable care in handling plutonium" required a licensee to follow additional

(or conflicting) procedures X, Y, and Z. But as this Court found in *Pacific Gas & Electric Co., supra*, with a few express exceptions the federal government has preempted the field of nuclear safety regulation. In those circumstances the Supremacy Clause precludes the state from addressing matters that are " 'in any way regulated by the federal government.' " Slip op. 19-20.

In addition to invading the area of federal substantive law, the state, by allowing punitive damages, provides a remedy that conflicts with the federal remedial scheme. As this Court has recently noted, "punitive damages, by their very nature, are not awarded to compensate the injured party. * * * [D]eterrence of future egregious conduct is a primary purpose of * * * punitive damages * * *." *Smith* v. *Wade*, No. 81-1196 (Apr. 20, 1983), slip op. 19.[25] But that is precisely the function served by the NRC's system of civil penalties, which implements the direction of 42 U.S.C. (& Supp. V) 2282.[26] As the NRC has stated (47 Fed. Reg. 9991 (1982)):

> Civil penalties are designed to emphasize the need for lasting remedial action and to deter future violations.
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> * * * * *

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[25] Indeed, the *Restatement (Second) of Torts* § 908 comment f (1979), notes that "punitive damages are sometimes disallowed unless the defendant's conduct was 'aimed at the public generally' * * *." See also *Dayton Hudson Corp.* v. *American Mutual Liability Insurance Co.*, 621 P.2d 1155, 1158-1159 (Okla. 1980) ("the primary and ultimate benefit of such damages accrues to the community as a whole").

[26] Congress's grant of this power to the Commission makes the preemption issue here entirely different from that involved in *United Automobile Workers* v. *Russell*, 356 U.S. 634 (1958), *United Construction Workers* v. *Laburnum Corp.*, 347 U.S. 656 (1954), and *Farmer* v. *Carpenters*, 430 U.S. 290 (1977), relied upon by appellant (Br. 46). For as the Court pointed out in *Russell*, 356 U.S. at 646, "[t]he power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board."

> The structure of [the penalty system] takes into account the gravity of the violation as a primary consideration and the ability to pay as a secondary consideration. * * * [I]t is not the NRC's intention that the economic impact of a civil penalty be such that it puts a licensee out of business (orders, rather than civil penalties, are used when the intent is to terminate licensed activities) or adversely affects a licensee's ability to safely conduct licensed activities.

It is obvious that allowing state courts to duplicate the NRC's system of penalties could have the very effects the Commission tries to avoid. If sufficiently severe, a state punitive award may exceed in amount what the Commission finds appropriate or even—as in this case—what federal law permits. Cf. 42 U.S.C. (Supp. V) 2282(a) ($100,000 per violation). Such a judgment could "put[] a licensee out of business," and thereby upset the balance set by federal law between deterrence of unlawful conduct and encouragement of the activities promoted by the Atomic Energy Act.[27] A less drastic award could still "adversely affect[] a licensee's ability to safely conduct licensed activities." Whether either consequence will ensue can only be determined by a careful assessment of both the licensee's financial situation and the costs of safe operation—matters entrusted by federal law not to the vagaries of a jury verdict but rather to the NRC's uniform and expert judgment.

3. Appellant suggests (Br. 22-24, 27-29) that the 1954 Act and "the 1959 amendments had nothing to do with

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[27] "There is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power. * * * The same purpose is manifest in the passage of the Price-Anderson Act, 42 U.S.C. § 2210, which limits private liability from a nuclear accident. * * * The continuing commitment to nuclear power is reflected in the extension of the Price-Anderson Act's coverage until 1987 * * *, as well as in Congress' express preclusion of reliance on natural gas and petroleum as primary energy sources in new power plants * * *." *Pacific Gas & Electric Co., supra*, slip op. 28-29.

the scope of state tort law applicable in suits arising from radiation injuries" (*id.* at 29). Rather, he argues, the Atomic Energy Act should only be understood to preempt "state *administrative* safety regulation" of nuclear facilities (Br. 23 (emphasis added); *id.* at 27 ("licensing, inspection and administrative regulation")). This contention rests on a simple misunderstanding of the Supremacy Clause. As this Court has frequently pointed out, state

> regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. * * * [Such control] cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236, 247 (1959); *Local 926, Operating Engineers* v. *Jones*, No. 81-1574 (Apr. 4, 1983), slip op. 15 (claim for punitive damages under state law preempted by National Labor Relations Act); *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317-318 (1981). Thus the question is not whether the state has regulated by means of "tort law" rather than "administrative safety regulation," but whether the rules and remedies created by state law invade the field set aside for federal law. Here they do so.

B. The Price-Anderson Act Does Not Support Appellant's Argument That The State Is Authorized To Award Punitive Damages

Appellant argues (Br. 24-27, 29-38) that in passing the Price-Anderson Act, 42 U.S.C. 2210, and its subsequent amendments,[28] Congress preserved the entire corpus

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[28] The Price-Anderson Act was enacted in 1957. Pub. L. No. 85-256, 71 Stat. 576. In 1965 the Act was extended for ten years. Pub. L. No. 89-210, 79 Stat. 855. In 1966 the Act was amended to

of "state tort law" for application "in any suits arising out of nuclear incidents" (Br. 25). But in treating "state tort law" as an undifferentiated whole, appellant obscures the important differences between compensation for private injuries and regulation of the safety of licensee conduct in the public interest. Although Congress has consistently indicated a desire to leave the former to state control, it has with equal clarity made the latter the exclusive province of the NRC.

1. It is important at the outset to recognize that the Price-Anderson Act itself does not apply in any way to this case. As appellant concedes, that Act was not made applicable to plutonium processing plants until 1977, after Kerr-McGee's plant was closed (Br. 26 & n.32).[29] Moreover, even for covered facilities, the Act does not say what law governs an operator's liability for claims arising from a nuclear incident. What it does, rather, is simply to require that licensees maintain financial protection (in the form of insurance or otherwise) (42 U.S.C. 2210(a) and (b)) and execute indemnity agreements with the NRC (42 U.S.C. 2210(c)), and to limit aggregate liability for any single incident to $560 million (42 U.S.C. 2210(e)).[30]

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remove impediments to collection of private compensation. Pub. L. No. 89-645, 80 Stat. 891. In 1975 the Act was again extended for ten years. Pub. L. No. 94-197, 89 Stat. 1111.

[29] We are informed that the decision to close the Cimarron plant was an economic judgment by appellees. It was not directed by the NRC.

[30] In the event of an "extraordinary nuclear occurrence" (see 42 U.S.C. 2014(j))—not involved here—the Act requires licensees and contractors to waive defenses, thereby in effect imposing strict liability (Section 2210(n)).

Appellant reads far too much significance into the waiver provisions in the NRC's forms for nuclear energy liability policies and indemnity agreements (Br. 38-40). Those forms provide that licensees shall waive "[a]ny * * * defense as to * * * the fault of the" licensee (10 C.F.R. 140.91, app. A, ¶ 1(b)(1), at 800; 140.92, app. B, art. II ¶ 4(a), at 805), a provision that might suggest the

2. The Price-Anderson Act nonetheless does shed light on the extent to which Congress intended to preempt state law when it passed the Atomic Energy Act. What emerges from a review of the legislative history of the Price-Anderson Act is a clear dichotomy between the provision of compensation under state law, and the regulation of safety under federal law. It is clear that Congress did not object to—indeed, it sought to promote—strict liability under state law for any harm caused by federal nuclear licensees. In effect, Congress wanted licensees to insure the public against the costs of even unavoidable accidents resulting from their operation, *i.e.*, to internalize all the external costs of their business. Such a rule of strict liability would be sensible, given

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licensee's willingness to pay any claims for punitive damages. Lest claimants or courts draw that improper inference, the forms go on to state that the waivers do not apply to

> Any claim for punitive or exemplary damages, provided, with respect to any claim for wrongful death under any State law which provides for damages only punitive in nature, this exclusion does not apply to the extent that the claimant has sustained actual damages, measured by the pecuniary injuries resulting from such death but not to exceed the maximum amount otherwise recoverable under such law.

10 C.F.R. 140.91, app. A, ¶ 2(c), at 800; 140.92, app. B, art. II ¶ 5(d), at 805. As the proviso makes clear, there are situations where—as a result of the oddities of state law—punitive damages are permitted as a surrogate for compensatory damages. But appellant errs in drawing the further inference that punitive damages may be collected whenever state law will permit them. On the contrary, the proviso implies that, except in the stated circumstances, punitive damages are unavailable. Cf. *Massachusetts Bonding Insurance Co.* v. *United States*, 352 U.S. 128 (1956). Indeed, the notice of proposed rulemaking concerning the forms makes clear that punitive damages generally are not authorized by the Price-Anderson Act (33 Fed. Reg. 6982 (1968) (emphasis added)):

> It has also been deemed advisable to make the waivers inapplicable to claims for punitive or exemplary damages, since *the intent of the legislation is to assure compensation* for injury or damage from an extraordinary nuclear occurrence.

the obvious ineptness of state common law for creating substantive rules of safe conduct applicable to nuclear facilities. If licensees were strictly liable, the only issues in state tort litigation would be causation and the calculation of the damages required to compensate the victim of harm; questions about the duty of care would be irrelevant. That division of authority is desirable from a federal perspective as well. Because there is no federal interest in specifying how compensation (up to a certain limit) is to be distributed, it is efficient to leave that matter to the states. By contrast, the definition of safety standards, and their enforcement in cases where external costs alone provide insufficient incentive for compliance, are matters that call for the expert judgment of the NRC.

The Atomic Energy Act of 1954 included no provisions regarding compensation for harm caused by operators of nuclear facilities, and Congress assumed that such compensation would be available in private actions under state law. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 88-89 n.33 (1978). There were, as it turned out, two problems with that assumption. First, the unavailability of private insurance exposed licensees to potentially crippling liability, and thus created a "roadblock" to the development of nuclear power. S. Rep. No. 296, 85th Cong., 1st Sess. 1 (1957). Second, because an operator's "resources might well be exhausted at an early stage" (*Duke Power Co., supra*, 438 U.S. at 91), claimants had little assurance that they would in fact be compensated.[31] Those problems were addressed in the Price-Anderson Act by requiring financial protection, providing for government indemnity, and limiting liability.

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[31] Additional impediments to collection of private compensation—such as short statutes of limitations, state law immunities, and the uncertainty of recovery where state law did not impose strict liability—were removed by the 1966 amendment. See note 28, *supra*.

In the legislative history of the Act and its subsequent amendments, however, there is no evidence that Congress envisioned any kind of state law action *other* than one for compensatory damages. The Senate report on the bill enacted in 1957 states that its purpose was to "provid[e] adequate *protection against liability* arising from atomic hazards as well as a sound basis for *compensating the public* for any possible injury or damage arising from such hazards." S. Rep. No. 296, *supra*, at 8 (emphasis added). And in speaking of how the funds provided for by the Act should be distributed, the report on the 1966 amendments envisions "an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims * * *." S. Rep. No. 1605, 89th Cong., 2d Sess. 17 (1966).[32]

Congress's recognition of a right to state law compensation is almost invariably coupled with expressions of confidence that the NRC's regulation of nuclear safety

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[32] See also S. Rep. No. 296, *supra*, at 15; S. Rep. No. 650, 89th Cong., 1st Sess. 13 (1965) ("persons suffering damage from a nuclear incident may obtain rapid and adequate financial compensation"); H.R. Rep. No. 883, 89th Cong., 1st Sess. 13 (1965) (same); *Proposed Amendments To Price-Anderson Act Relating To Waiver Of Defenses: Hearings Before the Joint Comm. on Atomic Energy*, 89th Cong., 2d Sess. 34 (1966) (*"1966 Hearings"*) ("damage consist[ing] of personal injury or injury to property"); S. Rep. No. 94-454, 94th Cong., 1st Sess. 14 (1975) ("claims for actual losses to property, for actual and reasonable medical expenses, for loss of wages, * * * for alleged pain and suffering, emotional harm, and loss of consortium"). Cf. *Teamsters Union* v. *Morton*, 377 U.S. 252, 260-261 (1964).

Congress was aware, though, that even private actions under state law for compensation might require a helping hand from the NRC, because of the complexity of the subject matter. In speaking of the requirement that the Commission conduct a survey of the causes of some nuclear incidents (see 42 U.S.C. 2210(i)), the original Senate report said: "This survey * * * is, in part, an aid to the parties in any action where it is unlikely that the public would be able to obtain the full amount of technical information which might be required." S. Rep. No. 296, *supra*, at 24.

would make such claims unnecessary. As both houses noted when the Act was first extended, there was an "intimate relationship * * * between Congress' concern for prevention of reactor accidents and the indemnity provisions of the Price-Anderson legislation." S. Rep. No. 650, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. No. 883, 89th Cong., 1st Sess. 5 (1965). The hearings that year opened with testimony by the Commission itself on the need for an extension (emphasis supplied):

> This recognition of national benefit to be derived from the development of peaceful uses of atomic energy was accompanied by recognition of the *responsibility of the Federal Government* to assure that there is appropriate protection of the public against hazards associated with uses of atomic energy materials.
>
> Interest in protection of the public safety has been evidenced in congressional legislation in several ways. The Congress included in the 1954 act * * * provisions designed to establish a *comprehensive regulatory program to assure that the health and safety of employees and the public would be adequately protected.* In 1957, Congress enacted the Price-Anderson Act which was designed to protect * * * the public by assuring that * * * funds would be available for the payment of damages.

Proposed Extension of AEC Indemnity Legislation: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, 89th Cong., 1st Sess. 4 (1965) (*"1965 Hearings"*). But "[t]he Price-Anderson Act is not intended to substitute money for safety. Safety is the primary concern of the Commission * * *." *1966 Hearings, supra* note 32, at 9.[33] That division of authority—

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[33] See also *Governmental Indemnity: Hearings Before the Joint Comm. on Atomic Energy*, 84th Cong., 2d Sess. 60-61 (1956) (*"1956 Hearings"*) ("The Atomic Energy Act of 1954 gives to the Commission the responsibility of protecting the health and safety of the public[.] * * * However, it must be recognized that in spite

compensation under state law, safety regulation under federal law—was intended to apply even in cases where the licensee had *willfully* caused injury to the public:

> The suggestion * * * that willful damages be excluded was not accepted since the damage to the public is the same, whether caused by any means—willful or nonwillful. However, the circumstances surrounding any nuclear incident, including the willfulness, would certainly be grounds for examining and possibly suspending the operations under the license.

S. Rep. No. 296, *supra*, at 18.

It is natural that, having left the problem of compensation to state law, Congress should take a hard look at whether state remedial law was adequate to resolve the problem. The numerous references to state tort law collected in appellant's brief (Br. 24-27, 29-38) reflect nothing more than Congress's deliberations on that specific issue.[34] Congress ultimately concluded that, with a few

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of all precautions * * * an accident could occur"); S. Rep. No. 296, *supra*, at 2 ("The Commission has extensive powers to protect the public health and safety through its regulatory acts, and it also has mandate for a strong Inspection Division to see that the regulations are complied with. * * * All of these minimize the possibility of such damage to persons and property"); S. Rep. No. 1605, *supra*, at 6 ("[i]t is generally recognized that the possibility of a catastrophic nuclear incident is extremely remote because of * * * the safety requirements imposed by the AEC").

[34] Appellant lays great stress (Br. 36-38) on the only reference to punitive damages in the entire legislative history of the Price-Anderson Act—a one-page discussion in a law review article attached as Appendix 39 to the *1965 Hearings*, *supra*, at 415-416. In that article, Professor David F. Cavers argued that "[w]ith two principal exceptions, the advantage of having uniform rules of damages for nuclear incidents throughout the nation does not seem great." Cavers, *Improving Financial Protection of the Public Against the Hazards of Nuclear Power*, 77 Harv. L. Rev. 644, 662 (1964) (*"Cavers"*). One of Cavers's "principal exceptions" was punitive

federal amendments designed to guarantee strict liability in the case of an extraordinary nuclear occurrence, it could safely rely on remedies provided by state common law to assure compensation. S. Rep. No. 1605, *supra*, at 9-10; 42 U.S.C. 2210(n).

To acknowledge that Congress relied on state remedies to provide compensation, however, is not to say that Congress left in place the entire corpus of state common law.[35] Congress surely did not intend, for example, that a state court should entertain an action for nuisance to enjoin the operation of a nuclear power plant because the court believed it was unsafe. Cf. *Garner* v. *Teamsters*, 346 U.S. 485, 488-491 (1953). Nor did it suppose that a state could enjoin as a trespass the release of effluents from a

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damages. He argued that to pay them out of insurance or government funds would eat into the compensation fund provided by the Price-Anderson Act. On the other hand, to permit such awards and refuse to pay them out of insurance would open "a serious gap * * * in the financial protection" the Act was supposed to provide to operators (*id.* at 663).

Cavers's article was not discussed in his testimony at the 1965 Hearings (*1965 Hearings*, *supra*, at 211-223). And the failure to forbid punitive damage awards explicitly in the 1966 amendments may show nothing more than Congress's belief that punitive damages were already preempted by the 1954 Act, and inconsistent with the compensation scheme of the Price-Anderson Act.

[35] Nor does it mean that states were left free to award compensation against the operator of a nuclear facility in all cases where the states might deem it appropriate. For example, "to allow damages, even in a private action, for psychological nuisance would be in direct conflict with" the Atomic Energy Act. E. Stason, S. Estep, & W. Pierce, *Atoms and the Law* 352 (1959). The same may be true where the existence of harm itself is a matter of prediction, and the level of radiation is within limits that the NRC has concluded are safe. Cf. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, Nos. 81-2399 and 82-358 (Apr. 19, 1983). But see *McKay* v. *United States*, 703 F.2d 464 (10th Cir. 1983).

plant in compliance with NRC regulations. 10 C.F.R. Part 20 app. B; cf. *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972). And as the court of appeals in this case pointed out (J.S. App. 22a), the limitation on liability in the Price-Anderson Act (42 U.S.C. 2210(e)) "implicitly assumes that only compensatory damages will be awarded" in the event of an extraordinary nuclear occurrence.[36] Rather than preserve all state common law rules, what Congress did was to leave to the states a narrow area not governed by the Atomic Energy Act—the provision of compensation to protect discrete private interests harmed by the operations of federal licensees and contractors. By contrast, the imposition of sanctions for unsafe operations—and the concomitant regulation of future licensee conduct in the public interest—was specifically addressed in the Act and so withdrawn from the states.

3. Appellant nonetheless argues that because the Price-Anderson Act envisions awards of compensatory damages under state law, it necessarily signals congressional approval of punitive damages as well. That is so, he asserts (Br. 42-45), because compensatory damages are themselves a form of regulation, and punitive damages do not address any practices not already regulated by compensatory damages. Appellant also contends (Br. 45-49) that the state interest in policing malicious or reckless conduct is one " 'deeply rooted in local feeling and responsibility[,]' " and it is thus unlikely that Congress intended to displace it in favor of federal regulation.

Appellant's first argument simply ignores what this Court only recently made clear:

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[36] To suggest that Congress authorized punitive damages for harms of lesser magnitude is to ascribe to it a somewhat perverse intent.

the federal government has occupied the entire field of nuclear safety concerns, except the limited powers *expressly* ceded to the states.[25]

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[25] In addition to the opportunity to enter into agreements with the NRC under § 274(c), Congress has specifically authorized the states to regulate radioactive air pollutants from nuclear plants, Clean Air Act Amendments of 1977, § 122, 42 U.S.C. § 7422 (Supp. III 1979), and to impose certain siting and land use requirements for nuclear plants, NRC Authorization Act for Fiscal Year 1980, Pub. L. 96-295, 94 Stat. 780 (1980).

Pacific Gas & Electric Co., supra, slip op. 19-20 & n.25 (emphasis added). As the language ("expressly") and the examples demonstrate, state authority to regulate either by statute or by common law in this area is not to be found by inference. It is conferred by Congress only in explicit statutory language. With regard to compensatory damages the Price-Anderson Act—whose very purpose was to assure compensation under state law—satisfies that requirement. On the other hand there is, in the language and the history of the Atomic Energy and Price-Anderson Acts, no indication whatever that Congress intended to allow awards of punitive damages for licensee conduct found by a jury to endanger the public safety.

Appellant also errs in suggesting that punitive damages do not regulate any practices not already controlled by compensatory damages.[27] It may be that the *occasion* for punitive damages is also one calling for a compensatory award. But the very purpose of punitive damages is to fine the defendant in order to control his *future conduct*

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[27] This case affords a vivid illustration of the staggering differences that may occur between "regulating" through compensation and "regulating" through punitive damages. Because the court of appeals held that compensation for personal injury to Silkwood could only be awarded under the Oklahoma workers' compensation law, the award of $10 million in punitive damages—if reinstated—would be appended to a $5000 verdict for property damages.

in a way that payment of compensation will not. Cf. *Electrical Workers* v. *Foust*, 442 U.S. 42, 50-52 (1979).

Nor should it be thought curious that Congress displaced punitive damages with civil (42 U.S.C. (Supp. V) 2282(a)) and criminal (42 U.S.C. (& Supp. V) 2272-2278b, 2283-2284) penalties, but left compensatory awards to state law.[38] Having contemplated that licensees could be required to insure the public against the costs of even unavoidable accidents—*i.e.*, be strictly liable for compensating any harm caused[39]—Congress doubtless saw little benefit in requiring that the funds be distributed through federal hands.[40] The assessment of

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[38] Appellant argues that "[i]f a corporate board of directors acted to rid itself of a particularly annoying critic of nuclear power by mixing plutonium from the plant into food served that critic, it could hardly be contended that a state court, by awarding punitive damages, was doing so for the 'purpose' of 'protection against radiation hazards' in the sense Congress intended by those words" (Br. 48). The short answer to appellant's example is that a state could no more award punitive damages against *the licensee* in that case than it could revoke its license. The state could, of course, prosecute the directors for murder, just as it could award compensation to the victim's heirs. The NRC performs neither of those functions, and prosecution of the individuals involved would neither "put[the] licensee out of business" nor "adversely affect[its] ability to safely conduct licensed activities." 47 Fed. Reg. 9991 (1982); *Cavers*, *supra*, 77 Harv. L. Rev. at 664 ("recovery of punitive damages should be denied in all nuclear cases, except perhaps a case against a wrongdoing individual, who, as to these damages, should not be protected by the operator's insurance or indemnity"). The NRC could also impose sanctions on the licensee to ensure its cooperation in preventing the recurrence of such an incident. Cf. *In re Atlantic Research Corp.*, *supra*.

[39] See *Cavers*, *supra*, 77 Harv. L. Rev. at 667-668.

[40] States are of course left free to restrict the collection of compensation by not taking up the option to impose strict liability (at least in the case of incidents falling short of an extraordinary nuclear occurrence). By doing so they frustrate neither of the two primary objectives pursued by Congress in the Atomic Energy Act: promoting the availability of commercial nuclear power at competitive prices (see note 27, *supra*), and protecting the public

penalties, by contrast, requires an assessment of past and future licensee conduct (including licensee safety precautions); how it has departed from federal standards; what sanctions will promote (rather than impede) safe operations; and so on.[41] Congress accordingly left those issues to the uniform and expert judgment of the Commission.

It is true, as appellant states (Br. 43), that requiring licensees to pay the external costs of their operations will encourage them to avoid such costs, and so in a sense compensatory damages may be seen as a type of state "regulation" of nuclear power. But there is no way to split that effect from its cause. And the fact that Congress was willing to accept the "regulation" inherent in leaving the states some freedom to determine how to distribute the costs of accidents, does not in the least suggest that it must also have authorized the states to revoke operators' licenses, or to impose fines that might have the same effect, because of what the states may deem unsafe practices. The ultimate "regulatory" effect of compensation is simply to require that nuclear energy be truly efficient—*i.e.*, that it cover all its costs, including the cost of accidents. The Atomic Energy Act demands more of the nuclear industry: that it be safe as well as efficient. But, with a few express exceptions, Congress left to the NRC "the entire field of nuclear safety con-

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health and safety against the hazards of radiation. See 42 U.S.C. 2011-2012.

[41] For example, in deciding what penalty to impose for willful violations, the NRC considers the intent of the violator (*e.g.*, recklessness rather than deliberateness), the position of the person involved in the violation (*e.g.*, first line supervisor or senior manager), the significance of the underlying violation, the economic advantage gained by the violation, and so on. 47 Fed. Reg. 9990 (1982). The Commission then imposes sanctions of five different severity levels for seven different activity areas, and adjusts base penalties to take account of such matters as prompt identification and reporting, corrective action, enforcement history, etc. (*id.* at 9990-9995).

cerns * * *." *Pacific Gas & Electric Co., supra*, slip op. 19.[42]

CONCLUSION

Should the Court conclude that it has jurisdiction of the appeal, the judgment of the court of appeals should be affirmed. Alternatively, the appeal should be dismissed and the papers treated as a petition for a writ of certiorari, and the petition should be denied.

Respectfully submitted.

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JUNE 1983

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[42] Appellant's contention that the preemption of punitive damages violates due process (Br. 49-50 n.48) is frivolous. As this Court recognized in *Duke Power Co., supra*, 438 U.S. at 84, the only question regarding such claims is whether Congress's decision to preclude punitive damages "is demonstrably arbitrary or irrational." It clearly is not. Congress merely substituted for one means of controlling licensees' conduct (a means subject to the whims of a jury), another method implemented by the NRC. Plaintiffs who are the incidental beneficiaries of juries' discretionary punitive awards have no right under Oklahoma law to exemplary damages, see *Amoco Pipeline Co.* v. *Montgomery*, 487 F. Supp. 1268, 1272 (W.D. Okla. 1980), even in order to pay the expenses of litigation. *Cox* v. *Theus*, 569 P.2d 447, 450 (Okla. 1977). They may still receive compensation for harmful licensee misconduct, either under workers' compensation or, in a proper case, in the form of compensatory damages (J.S. App. 3a-21a).

Appellant apparently no longer contends, as he did in his jurisdictional statement (J.S. 24-29), that Congress violated the equal protection component of the Fifth Amendment when it preempted punitive damages.

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